CARTER'S APPEAL
CERTIORARI
To the Orphan's Court
of Philadelphia County.

In the Supreme Court of

July Term, 1847. No. 13.

Statement of the Case.

JACOB FINK died, having made his will, in writing, which was proved July 7, 1824, and of which all his Executors, Adam Fink, Jacob Fink and Emanuel Krail took letters testamentary. An Inventory was filed July 13, 1824, but E. Krail seems to have acted alone.

The will provides for payment of his debts, and gives his daughter (the said Krail's wife) $100, and allows any of his children to take furniture at its appraised value.

The residue is divided into fifths, four of which go to his four surviving children, Adam, George, Jacob and Mrs. Krail, to take the income thereof equally during their lives, whenever as much as $100 maybe on hand, if they desire it. The other fifth goes to the children of his deceased daughter, Mrs. Schnaible; the principal to be invested in stocks, &c. till they become of age respectively, when each gets his equal portion thereof and its income in the meantime.

After his surviving children's decease, the children of each of them get a fifth of the residue divided among them when his youngest grandchild shall be 21 years of age. The executors may, with the written consent of all his children, and of the guardians of Mrs. Schnaible's children, sell and convey his real estate, and invest and reinvest the proceeds, toties quoties, to the said uses, in mortgages, ground rents, public stock, or other productive property.

Five accounts were filed, all by E. Krail; the first, May 14, 1827, accounts for assets $3839 94; and at its foot claims deduction for the loss of L. Schnaible's bond, $900, and for three dozen stocking boards, appraised by mistake, $9. All the other credits there claimed seem the results of neglect, mismanagement and unauthorised speculating in manufacturing, trading, &c. The credit side of this account shows debts, mostly incurred in these ventures, and for which he showed but very rarely any voucher whatever, amounting to about $3,310. The balance admitted in his hands, after all deductions claimed, is $529 22.

He petitioned the Orphans Court for an order to sell *all* the testator's real estate, and, on Nov. 3, 1827, obtained such order *so far as necessary to pay debts*, of which he annexed a schedule (paper book page 7) including one claimed as due himself, called a 'promissory note,' of $300. Under this order he sold the most productive piece of the estate; and (though sacrificed to his own interest) to an amount made much greater than requisite for the avowed object. At this sale he procured Mr. S. W. Thackara to buy it for the accountant at $2200, which was much below its value; and he caused the sale, by a false report being made to the Court, to be confirmed. He, through

Mr. Thackara, collected its rents, sold a stable off it for $40, and in about four months after the confirmation, got a reconveyance of it from Mr. Thackara for a nominal price. From that time out he owned it till he sold it in March, 1830, to Jonathan Hunn, without further improvement, for $1050 more than he paid for it at the Orphans Court sale, besides receiving its rents meanwhile.

His second account (filed May 28, 1831) shows but $44 of balance from his first account (where it was $529 22, after all deductions then claimed) and he credits himself with $100, June 8, 1828, as paid F. J. Traubat, Esq. "for services rendered the estate," which never had one suit to prosecute or defend.

His third account (filed April 17, 1833) recites the balance (except 95 cents) admitted in his second, shows assets $976, and claims credits $378 56, including $60 paid F.J. Traubat, Esq. April 17, 1833, "for settling the first account."

His fourth account (filed Aug. 24, 1836) shows assets $4750 04, and $707 13 paid out, including $50 to F. J. Traubat, Esq. Oct. 14, 1835, "for professional services," and a balance of $4042 89 in hand, including the price of all testator's real estate.

His fifth account, (filed Feb. 27, 1845) shows $5,835 13, including the last prior admitted balance, received; and $3610 86 disbursed, including $17 20 paid to F. J. Traubat, Esq.—$5 to Macauley "for advice," and $25 to James Page, Esq. as counsel fee, (besides what the auditor distributed as such) $1712 79 distributed among the testator's children—Mrs. Schnaible's children ~~and Adam Fink's children~~. The debtor side of this account shows that he privately used, for his own purposes, $2292 89, for which he charges himself interest on but $1870 70, and that not for the full time he held it. This account also shows 13 shares of Girard Bank stock, at $59 50 per share, charged to the estate as purchased Nov. 18, 1837, amounting to $775, and also 35 shares of Southwark Trust and Insurance Company at the same time, amounting to $975. These two investments remained his own individual stock, on the books of these corporations, until a week before filing this account, when he transferred them both, on the books, to himself *as executor of Jacob Fink, deceased*, and gave the estate credit for $475 47 as their proceeds since purchased.

The four accounts, filed prior to October 21, 1836, were, on that day, referred to an auditor, who was never notified of his appointment; and it was rescinded June 20th, 1845, (paper book, page 14,) and all the accounts referred to W. A. Porter, Esq., as auditor, upon exceptions filed May 3, 1845, (pages 14 to 18). Jacob Fink, being appointed guardian of his own children's estates, filed immediately thereafter exceptions also, (pages 17 and 18).

Before the auditor, the exceptants insisted on proving, under the first and tenth exceptions, that the accountant had sold and bought testator's real estate in Kensington, under the Court's order of sale, fraudulently made large profits to himself, for which they desired him to account as assets. The auditor decided that he could examine only the last account, and rejected the offer of the exceptants. They therefore withdrew until he should report; and having done

Court remitted the whole to him, with instruction to examine all the accounts. The exceptants repeated their offers of said proofs, and demanded an account of said profits; when the auditor evaded them again, by alleging that it was requesting him to try land titles, and also by denying that the grandchildren of testator had any vested interest, or were entitled yet to make any exceptions to the accounts.

The second or supplemental report of the auditor being filed without notice, both parties filed exceptions to both his reports; and began to take depositions, under rule of Court, to sustain those exceptions; when, after taking Mr. Thakara's, the taking of others was, at the request of the accountant's counsel, adjourned till the next Tuesday. But the argument list being fixed for the next Monday, and the exceptions being reached thereon, the Court refused time to take any more depositions, or even to bring Mr. Thackara's from the alderman before whom it was taken, but made the following

DECREE.

After argument the Court dismiss all the exceptions filed except one, and that is the first filed by the accountant, alleging that the auditor erred in striking from the account a credit of $306 50. We think the executor ought to have the benefit of that credit. It is therefore ordered that this sum be placed to his credit, and the report is re-committed to the auditor to make this correction, and that his report in other respects be confirmed.

A. V. PARSONS.

July 3d, 1846.

The auditor made the correction ordered, and re-filed his report September 14, 1846, showing a balance then against the accountant of $3434 30.

The appellants from said decree filed the following

SPECIFICATION OF ERRORS.

That the Court erred in the following particulars, to wit:

1st. In allowing the accountant credit for $306 50 as paid to himself 10th December, 1827, and the interest charged thereon; and in not charging him therewith, and with the interest taken by him for it, as well as with interest on each item of principal and interest since the times he took the several sums out of the estate.

1. Because he produced no sort of voucher or evidence to prove that it had been ever due to him.

2. Because its having ever been due is rendered very improbable by his not producing the testator's obligation or other evidence of the debt, while he produced all other obligations of the testator that he ever paid; and by his calling it "*money borrowed*," in his first account; a "*promissory note*" in the schedule to his petition for an order to sell real estate, (page 7,) and a "*bond*" in his second account.

Verner's Estate, 6 Watts, 250. Executors are never permitted to make profit to themselves out of the estate's funds. And although an extensive discretion is allowed them in settling claims against the estate, the Court will not dispense with their exhibiting proper vouchers for payments made.

Clauser's Estate, 1 W. & S. 208. An administrator having a bond due him against his intestate's estate must file a copy or statement thereof, within seven years, with the Prothonotary, or lose his lien under the act of 1797.

2d. In allowing him for counsel fees, as paid F. J. Troubat, Esq., and others, amounting to $275, besides what the auditor distributed as such fees.

1. Because Mr. Troubat's services were for procuring the sale and purchase of testator's real estate for the accountant's own benefit and profit.

2. Because the accountant was not, as executor, involved in any litigation, and none of those fees was for the benefit of the estate.

Hartzell v. *Brown*, 5 Binn. 138. Costs incurred through motives of duty are allowable out of the estate; but not those incurred by the accountant's self interests.

Pusey v. *Clemson*, 9 S. & R. 209. Executor is not allowed fee to counsel for advice in stating an account.

Sterrett's Appeal, 2 P. R. 426. Where legal advice is needed to executors, or where they must prosecute and defend suits, the estate should pay reasonable counsel fees. But where they neglect to settle, have to be cited, and employ counsel to defend themselves, no such fees should come out of the estate.

Mumper's Appeal, 2 P. R. 441. Executor is not to be allowed fees paid counsel in trying an issue, *devisavit vel non*, involving the validity of the will.

3d. In not charging the accountant with the profits made by his purchase and sale of the testator's real estate, or part thereof, in Kensington; by his receipt of its rents in Samuel W. Thackara's name, for three years and a half; and by selling a stable thereon to Clement Collins.

Difference between what he purchased and sold it at,	$1050 00
Its rents while he owned it,	624 00
Price of said stable,	40 00
	$1714 00
Interest on that sum, $17 14, till the Court's decree, sixteen years,	1645 44
	$3359 44

1. Because he, through said Mr. Thackara, purchased it for himself, and made the above profits, sold the said stable off it, appropriated the proceeds to his own use, and sold it to Jonathan Hunn, for $1050 more than he paid for it when sold under the order of the Orphans' Court.

M'Grew's Appeal, 14 S. & R. 396. The settlement of a partial account does not preclude the Court, on settlement of supplemental

accounts, enquiring into errors in former accounts; particularly where minors are interested, and had no guardian when the first was settled.

Verner's Estate, 6 Watts, 250. Executors are, under no circumstances, permitted to make profit for themselves out of the estate.

Chronister v. *Buzby*, 7 W. & S. 152. Administrator cannot, directly or indirectly, purchase real estate of his intestate, sold by order of Orphans' Court; and heirs may recover it from him in ejectment, though they did not except to his accounts, and knew that decedent's debts exceeded his personal estate.

Harlan's Accounts, 5 Rawle, 323. There is no rule in Pennsylvania that compound interest may not be charged against a trustee in case of his corruption.

4th. In allowing credit for bill, $19 50, paid to Adam Fink's physician.

1. Because it was not charged in any of the accounts.

2. Because it was a debt due from Adam Fink's estate only, and not from the testator's.

5th. In not charging the accountant with the expenses and costs of the audit, but allowing these charges to be taken out of the estate, and in sanctioning the auditor's distribution of part of the fund as fees to counsel engaged in the audit; as well as in allowing all these to an exorbitant amount.

1. Because the audit was occasioned by filing erroneous accounts, and that the balance against the accountant was thereby increased.

2. Because the said counsel fees were no part of the accounts, nor referred to the auditor, or within his jurisdiction.

3. Because paying them out of the estate was a violation of the will, which devised to testator's grandchildren his whole residuary estate.

Yundt's Estate, 6 Barr. 35. Auditors appointed to settle an administration account, have no authority to distribute; their powers being limited by the Court's order.

Sterrett's Appeal, 2 P. R. 426. Where the balance is changed by the audit from being in favour of the accountant, he, and not the estate, should bear the cost of the audit.

6th. In not allowing and sustaining the exceptions filed on the 3d of May and 28th of June, 1845, (page 14 to 18,) to the accounts filed; and on the 17th of April, 1846, to the auditor's report, on behalf of the *cestuy qui trust.*

Walker's Estate, 3 Rawle, 243. The original and all supplemental accounts are but one. The Court should therefore examine into exceptions to former accounts, though long confirmed absolutely and regularly. *Harlan's Accounts. Ante.*

7th. In sustaining the distribution of any part of the principal fund, as done by the supposed virtue of an alleged release (page 26, &c.) of some of the testator's legatees and devisees, bearing date the 21st November, 1836.

Because the will gave the *whole* residue to the testator's grandchildren, after his children's decease; and such distribution of part thereof violates the testator's will and the rights of his grandchildren.

8th. In sustaining any of the exceptions filed on behalf of the accountant, to the auditor's report.

Reasons for this are assigned under the first preceding exception.

DEPOSITIONS.

Samuel W. Thackara testifies that he took a conveyance of part of the late Jacob Fink's property, but could not say in what year—thinks he accepted the conveyance in behalf of Emanuel Krail, who furnished the money to pay for it. Deponent did not pay for it. After some time he reconveyed it to Mr. Krail; does not remember how long he held it; believes he acted in the premises under Mr. F. J. Troubat's advice; does not remember receiving its rents; admits as deponent's writing a receipt (shown him) dated 12th March, 1828, for $30 rent paid by Jacob Fink; deponent admits that he must have received the said rent. Another receipt to Clement Collins, for $40, price of a two-story frame stable, "standing on the rear of the lot of ground which I purchased from Emanuel Krail, executor of Jacob Fink," dated January 5, 1828, being shown the witness, he testifies that it is in his writing; that he must have received that money, and accounted for it to Mr. Krail; received no benefit from the transaction; remembers no property conveyed by him to Mr. Krail but that.

John U. Kuemerlen testifies that he owns where he resides; that he purchased that property from Jonathan Hunn—"these are my title papers for said property"—the first a deed from Emanuel Krail, executor of Jacob Fink, deceased, to Samuel W. Thackara, 29th November, 1827, price $2200, and certificate attached thereto of its confirmation by the Orphans' Court of Philadelphia, November 16, 1827. Second. Deed from Samuel W. Thackara, (endorsed on the former,) March 24, 1828, price $1. Third. Deed from Emanuel Krail and wife to Jonathan Hunn, March 19, 1830, price $3250.

Henry Crilly testifies that he resides next door to the last witness, and has done so twenty-five years; there were three buildings back beside the front, in 1827; one of the three was a three-story frame; there was a two-story frame on the back of the lot, making four dwellings and a stable; thinks that from 1827 to 1830, the whole (excluding the stable) would rent for from $180 to $200 per annum. "I mean the property of Jacob Fink, deceased, now owned by Mr. Kuemerlen." Was at the sale of it by the executor, Mr. Krail; so far as I saw, it seemed a fair sale. "I think it was under value; I went intending to bid $2500 for it, but thought it was bought in for the heirs; the front building was new; the rest not so new."

Jacob Fink testifies that he lived in said property in 1824 and 1825; that it rented from 1827 to 1830 for $132 per annum; that his knowledge of this rent was obtained from the tenants; is a son of the testator, a party to the appeal, and interested in its result.

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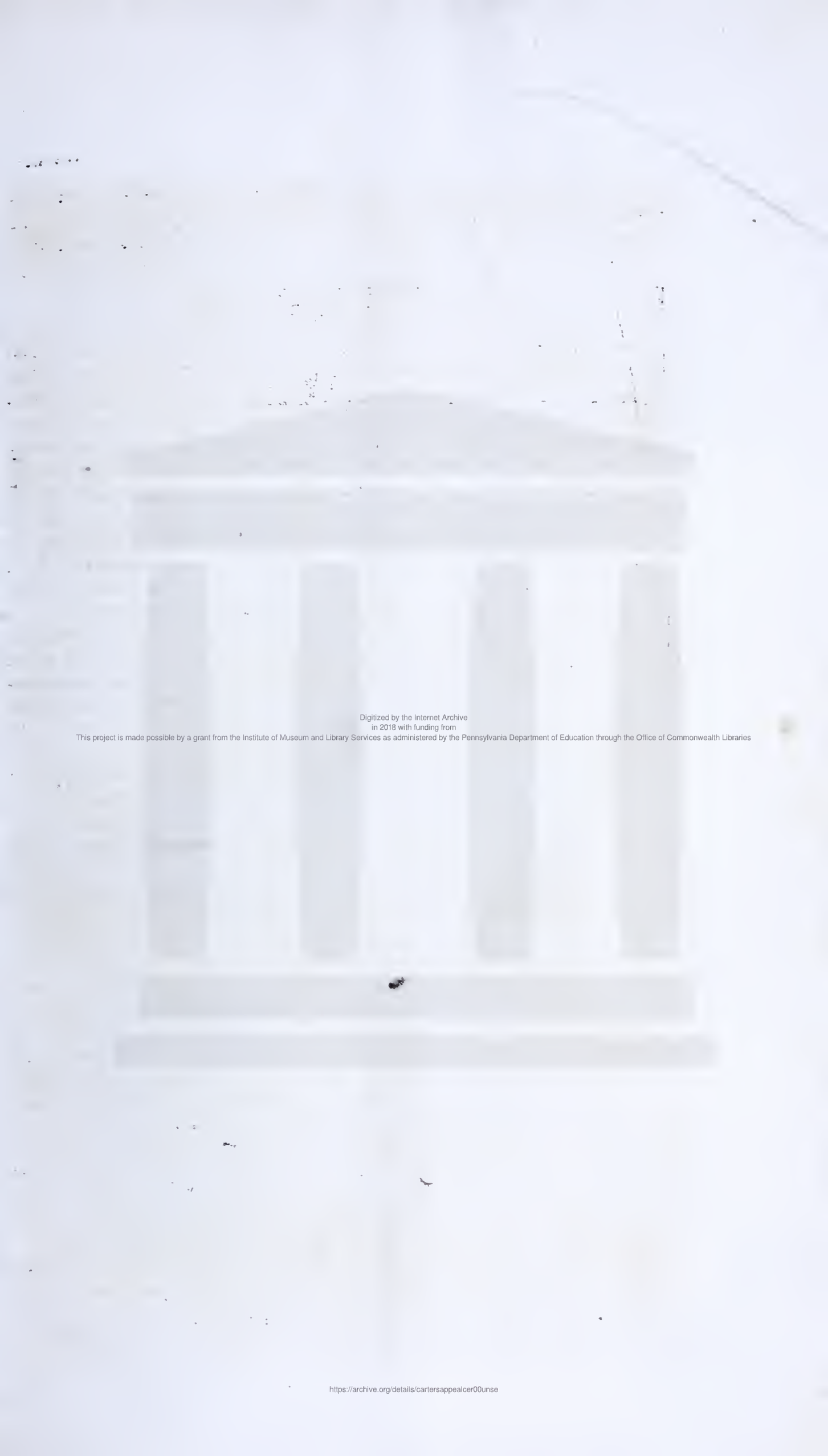

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